

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

CABLE NEWS NETWORK, INC.,

Plaintiff,

v.

FEDERAL BUREAU OF INVESTIGATION,

Defendant.

Case No. 1:17-cv-01167-JEB

**CNN’S OPPOSITION TO DEFENDANT’S MOTION FOR A STAY OF PLAINTIFF’S
MOTION FOR A DETERMINATION OF DEFENDANT FBI’S LIABILITY FOR CNN’S
REASONABLE ATTORNEYS’ FEES AND COSTS (ECF NO. 89) OR, IN THE
ALTERNATIVE, FOR AN EXTENSION OF TIME TO FILE RESPONSE THERETO**

What the Government snidely calls a “no-hold-barred ‘quest for disclosure’” of “very small scraps of information,” Dkt. 92 at 1, Plaintiff Cable News Network, Inc. (“CNN”) calls journalism in the public interest. And everyone – the Court, the Government and CNN – now agrees that the release of the Comey Memos serves the public interest.

Yet in motion after motion, and even after the Court eight weeks ago held that nearly all of the Comey Memos are now public record, the Government has continuously stalled releasing these records. The Motion for a Stay as to CNN’s attorneys’ fees motion is just the latest attempt to drag out the final resolution of this long-pending matter. The Court should reject any further delays, deny this motion, and award CNN entitlement to its attorney’s fees.

The Rule 59(e) Issues Are Unrelated to CNN’s Entitlement and Eligibility to Fees

Contrary to the Government’s contention, Dkt. 91 ¶ 5, its pending Rule 59(e) motion – which is now fully briefed and pending the Court’s ruling – is irrelevant to a determination of whether the Government is liable for any portion of CNN’s attorneys’ fees. The pendency of the

Rule 59(e) motion therefore has no impact on the Court's consideration of the fees motion.

The Rule 59(e) motion is addressed solely to that portion of this Court's June 7, 2019 order mandating the release of an unredacted copy the First Archey Declaration. Dkt. 87-1 at 2 ("This motion is directed to Part III.B.1 of the Court's June 7, 2019, decision . . . [which] addressed Plaintiff's right . . . under the common-law right of access to the material redacted from the First Archey Declaration."). Access to the First Archey Declaration, filed under seal to support the Government's defense in this litigation, is governed by the common-law right of access to judicial records, not the Freedom of Information Act. Dkt. 86 at 30-35; *see also* Dkt. 87-1 at 4 (Government's acknowledgement that FOIA does not apply to the First Archey Declaration). For this reason, because CNN is only entitled and eligible for fees arising from its vindication under FOIA, CNN has not asked this Court to consider any award of fees in connection with the unsealing of the First Archey Declaration. *See generally* Dkt. 89.

Therefore, any ruling regarding the Rule 59(e) motion would not impact the Court's consideration of CNN's eligibility and entitlement to fees. The Court should deny the Motion for a Stay.

Courts Don't Wait for Conclusions of Appeals to Determine Fee Liability in FOIA Cases

Likewise, the Government's raising the prospect of an appeal after the Court rules on the 59(e) motion also does not warrant a stay of CNN's fee motion. Courts in this District often consider fee motions in FOIA matters while appeals are pending. *See, e.g., Assassination Archives & Research Ctr., Inc. v. CIA*, 2018 WL 6790313, at *2 (D.D.C. Dec. 10, 2018), *report and recommendation adopted*, 2019 WL 1491982 (D.D.C. Apr. 4, 2019) (determining agency's liability for fee reimbursement during pendency of appeal).

Indeed, moving forward on the fees question now in the District Court will promote

judicial economy by permitting the Court to resolve all issues in one final judgment. For this reason as well, the Court should deny the Motion for a Stay.

The Government Raises an Empty Specter of Settlement for the Second Time in a Week

Finally, the Government's suggestion that a delay in the adjudication of any fees issue would promote a settlement rings hollow, especially in light of recent discussions. After CNN filed its fee motion, counsel for the Government invited CNN to make a proposal to settle the fees issue. CNN quickly replied with a proposed settlement amount supported by redacted copies of its billing records in this matter. Counsel for the Government then responded that the Government could not make a counter offer because there remain too many unspecified "contingencies" in this case.

After first inviting an offer, then rejecting the offer they solicited without inviting any further discussion, the Government has no business dangling the prospect of a settlement before this Court and CNN. While CNN remains ready to entertain good-faith settlement discussions, a stay in the Court's adjudications will not serve to foster negotiations, indeed, quite the opposite. A ruling that CNN is eligible and entitled to its fees for the FOIA portions of this case could only help the government commit to a discussion, rather than waffle over it.

In the alternative, the Government seeks a two-week extension of its August 2, 2019 deadline to respond to CNN's fee motion. CNN does not believe that an extension is necessary, but because that deadline has already passed, CNN does not oppose a brief, seven-day extension of the deadline to August 9.

CONCLUSION

For all of the foregoing reasons, CNN respectfully requests that this Court enter an order denying the Government's motion in its entirety or, in the alternative, extending its deadline to

respond to CNN's fee motion to August 9, 2019.

Dated: August 5, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on this date, I caused the foregoing to be filed and served electronically via the Court's ECF System upon counsel of record.

Dated: August 5, 2019

/s/ Charles D. Tobin
Charles D. Tobin